

THE STATE OF NEW HAMPSHIRE

Department of Environmental Services  
WATER COUNCIL

Appeal of Daniel Osborn  
Docket No. 05-17-WC

RECEIVED

DEC 12 2005

**STATE'S MOTION TO RECUSE VICE CHAIRMAN F. WAYNE DIMARZIO**

NOW COMES the New Hampshire Department of Environmental Services ("Department"), by and through its attorneys, the Office of the Attorney General ("State"), and respectfully requests that Council Member F. Wayne Dimarzio be recused from further participation in the Daniel Osborn Appeal, Docket No. 05-17-WC.

**I. BACKGROUND**

1. On December 5, 2005, the Water Council conducted a pre-hearing conference with respect to the Daniel Osborn Appeal, Docket No. 05-17-WC.
2. The presiding officer at the pre-hearing conference was Vice Chairman F. Wayne Dimarzio.
3. According to WC 203.10 the purpose of a pre-hearing conference is to determine whether the meeting can be resolved without a formal hearing. The pre-hearing conference can also be used to schedule a hearing if one is necessary.
4. At the pre-hearing conference, attorney for the Appellant asserted only that he wished to argue that the State's legal position regarding the inability to grant waivers was erroneous. See Tilton Affidavit.
5. The State agreed that the threshold legal matter stated by the Appellant needed to be decided before any hearing could be properly held on the substantive portions of the Appellant's claim. See Tilton Affidavit.

6. The presiding officer, Mr. Dimarzio, stopped the meeting in order to inform the State, in front of the Appellant, that he had already reached a conclusion regarding the merits of the underlying State decision. See Tilton Affidavit.

7. Mr. Dimarzio ordered the clerk, Mr. Sclafani, to stop the tape recorder and go off the record in order to make the following remark to the State:

I'm going to tell you what I think. Your position is Bulls\*\*\*. DES is not regulating where they are going to piss, where they are going to place their home or ..... These people just want to enjoy their home...and what they want to do is not going to hurt the environment.

See Tilton Affidavit.

8. Despite the comments of the presiding officer, the parties agreed that the threshold legal question needed to be decided prior to the resolution of any substantive questions. A hearing date was then set to present argument on the legal issue alone. See Tilton Affidavit.

## **II. ARGUMENT**

9. Pursuant to RSA 21-0:7, the Water Council shall “hear and decide” appeals from Department decisions relative to certain functions and responsibilities of the division of water. RSA 21-0:7 (Supp. 2005).

10. Such hearings are conducted pursuant to RSA 21-0:14 and RSA chapter 541-A and are, therefore, “adjudicative” in nature. RSA 21-0:14 (2000). See RSA 541-A:31 (Supp. 2005).

11. A judge shall be removed for bias if a party shows “the existence of bias, or such likelihood of bias, or an appearance of bias that the judge is unable to hold the balance between vindicating the interests of the court and the interests of [the party].” State v. Jeleniewske, 147 N.H. 462, 469 (2002) (citation omitted); see also Blaisdell v. City of Rochester, 135 N.H. 589, 593 (1992) (the code of Judicial Conduct requires a judge to avoid even the appearance of

impropriety and to conduct himself at all times in a manner that promotes public confidence in the integrity and impartiality of the judiciary).

12. The rules for judges apply “similarly to members of boards acting in a quasi-judicial capacity.” Appeal of City of Keene, 141 N.H. 797, 801 (1997) quoting Winslow v. Holderness Planning Board, 125 N.H. 262, 267 (1984).

13. The off-the-record statements of Vice Chairman Dimarzio made during the pre-hearing conference on December 5, 2005, demonstrate that he is incapable of impartially participating in this case.

WHEREFORE, the State respectfully requests that this Council:

- A. Recuse and prohibit Vice Chairman Dimarzio from presiding over any hearing regarding this matter;
- B. Recuse and prohibit Vice Chairman Dimarzio from voting or otherwise participating in this matter;
- C. Prohibit Vice Chairman Dimarzio from communicating *ex parte* with other Council members regarding this matter; and,
- D. Any other relief this honorable Council deems just and appropriate.

Respectfully submitted,

THE STATE OF NEW HAMPSHIRE

KELLY A. AYOTTE  
ATTORNEY GENERAL

**COPY**

Dated: December 12, 2005

K. Allen Brooks,  
Attorney  
Environmental Protection Bureau  
33 Capitol Street  
Concord, New Hampshire 03301-6397  
Tel. (603) 271-3679

**CERTIFICATE OF SERVICE**

I hereby certify that a copy of the foregoing *State's Motion to Recuse Vice Chairman F. Wayne Dimarzio* has been delivered by First Class U.S. mail this 12<sup>th</sup> day of December 2005, to Bernhard H. Campbell, Esq..

  
K. Allen Brooks

THE STATE OF NEW HAMPSHIRE

Department of Environmental Services  
WATER COUNCIL

Appeal of Daniel Osborn  
Docket No. 05-17-WC

**AFFIDAVIT OF MARY-ANN TILTON**

I, Mary-Ann Tilton, being duly sworn, do depose and say:

1. My name is Mary-Ann Tilton, and I am currently employed at the New Hampshire Department of Environmental Services.
2. On December 5, 2005, I attended a pre-hearing conference for the Water Council.
3. F. Wayne Dimarzio was the presiding officer at the pre-hearing conference.
4. At the pre-hearing conference, Counsel for the Appellant asserted only that he wished to argue that the State's legal position regarding the inability to grant waivers was erroneous.
5. The State agreed that the threshold legal matter stated by the Appellant needed to be decided before any hearing could be properly held on the substantive portions of the Appellant's claim. The presiding officer, Mr. Dimarzio, stopped the meeting in order to inform the State, in front of the Appellant, of his opinion regarding the merits of the underlying State decision.
6. Mr. Dimarzio ordered the clerk, Mr. Sclafani, to stop the tape recorder and go off the record in order to make the following remark to the State:

I'm going to tell you what I think. Your position is Bulls\*\*\*. DES is not regulating where they are going to piss, where they are going to place their home or.... These people just want to enjoy their home...and what they want to do is not going to hurt the environment.<sup>1</sup>

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<sup>1</sup> Because this statement was not on the record it is being reproduced from the memory of the Affiant.

7. Despite the comments of the presiding officer, the parties agreed that the threshold legal question needed to be decided prior to the resolution of any substantive questions. A hearing date was then set to present argument on the legal issue alone.

Dated: December 12, 2005

**COPY**  
*Mary-Ann Tilton*  
Mary-Ann Tilton

STATE OF NEW HAMPSHIRE, COUNTY OF MERRIMACK

On the 12<sup>th</sup> day of December, 2005, the above-named Mary-Ann Tilton personally appeared before me and made oath that the foregoing statements are true and correct to the best of her knowledge and belief.

**COPY**  
*Brenda D. Constant*  
Notary Public/Justice of the Peace  
My Commission expires: 7/13/2010



**BRENDA D. CONSTANT, Notary Public**  
**My Commission Expires July 13, 2010**